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Public Service Commission of Wisconsin
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BEFORE THE PUBLIC SERVICE COMMISSION OF WISCONSIN

Investigation on the Commission's Own Motion Into the Treatment of Transiting Traffic — 05-TI-1068

AT&T WISCONSIN'S INITIAL BRIEF ON LEGAL ISSUES RELATING TO TRANSIT TRAFFIC

Wisconsin Bell, Inc. (d/b/a AT&T Wisconsin) ("AT&T Wisconsin") hereby respectfully submits its initial brief on the four legal issues that the Commission identified in its February 2, 2006 Amended Notice of Proceeding relating to transit traffic.

EXECUTIVE SUMMARY

AT&T Wisconsin transits traffic originated by other providers to the terminating ILECs.[1] AT&T Wisconsin transits the traffic pursuant to Commission-approved interconnection agreements. AT&T Wisconsin's customers neither dial nor receive those calls. Since at least 1997, the terminating ILECs have known they were receiving transit traffic originated by third parties over the common, pre-existing trunks running between the terminating ILECs' and AT&T Wisconsin's networks. And the terminating ILECs have been aware, for that entire period, of AT&T Wisconsin's position that the originating provider – not AT&T Wisconsin – is responsible to pay the terminating ILECs for handling the traffic. In addition, the terminating ILECs have had access to monthly reports, furnished by AT&T Wisconsin, which identify the originating providers of transit traffic and the relative volume of transit traffic originated by each.

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1 For purposes of this brief, the term "terminating ILECs" is intended to refer to the rural or small ILECs who have intervened in this proceeding and who have claimed or will claim that AT&T Wisconsin is liable for the payment of access charges or other amounts for the termination of transit traffic.

compensation arrangements" *in their interconnection agreements.*[17] Both the incumbent local exchange carrier ("ILEC") and the other carrier "have a duty to negotiate in good faith the terms and conditions of an agreement that accomplishes the Act's goals."[18] If the parties fail to reach an agreement through voluntary negotiations, either party may petition the relevant state public utility commission to arbitrate and resolve any open issue. The final agreement, whether negotiated or arbitrated, must be approved by the state public utility commission.[19]

As held by several courts, the "comprehensive" process set out in sections 251 and 252 is the "exclusive" means for establishing arrangements contemplated by the Act's substantive provisions.[20] Neither carriers nor regulatory agencies may, through a tariff filing, "bypass" and "ignore" the "detailed process for interconnection set out by Congress" in the Act.[21] That rule applies with even greater force to "unilateral" tariff filings that have not been ordered by the agency.[22]

3. <u>The FCC's Local Competition Order declared that the MTA is the local calling area for wireless traffic.</u>

In August 1996, six months following the passage of the Federal Act, the FCC released its First Report and Order in *In re Local Competition and Interconnection Docket,* FCC No. 96-325, 11 FCC Rcd. 15499 (1996) (the "*Local Competition Order*"). Among the many issues addressed by the FCC was the Act's applicability to wireless carriers. *Id.*

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17 *Id.* at 1119 (quotations and citations omitted) (emphasis added).

18 *Iowa Utils. Bd. v. FCC,* 120 F.3d 753, 792 (8th Cir. 1997) ("*Iowa Utils. Bd.*") (citing 47 U.S.C. §§ 252(c)(1), 252(a)(1)).

19 *Id.* (citing 47 U.S.C. §§ 252(b), 252(e)(1)).

20 *Verizon North, Inc. v. Strand,* 309 F.3d 935, 939 (6th Cir. 2002); *see also MCI Telecomms. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1178 (D. Or. 1999); *see generally Pacific Bell,* 325 F.3d at 1127 ("[T]he point of § 252 is to replace the comprehensive state and federal regulatory scheme with a more market-driven system that is self-regulated through negotiated interconnection agreements"); *Iowa Utils. Bd.*, 120 F.3d at 801 (noting "Act's design to promote negotiated binding agreements").

21 *Verizon North,* 309 F.3d at 941; *Wis. Bell, Inc. v. Bie,* 340 F.3d 441 (7th Cir. 2003); *See also TSR Wireless, LLC v. U.S. West Commc'ns, Inc.,* 15 FCC Rcd. 11166, ¶ 29 (2000) (1996 Act and FCC's implementing regulations apply "regardless [of any inconsistent] federal or state tariff").

22 *See also Verizon North Inc. v. Strand,* 367 F.3d 577, 584-85 (6th Cir. 2004) ("unilateral" tariff filing is "a fist slamming down on the [negotiating] scales").

In particular, the *Local Competition Order* addressed charges associated with the transport and termination of wireless traffic, and the role of interconnection agreements in establishing those charges. In its *Local Competition Order*, then, the FCC had to determine which wireless calls were "local" calls subject to "reciprocal compensation" for "transport and termination" and those wireless calls that were "long-distance", the latter of which had historically been subject to "access" charges. *Id.*, ¶ 1033. The FCC concluded in paragraph 1034 of the *Local Competition Order* that "section 251 (b)(5) reciprocal compensation," and not tariffed "access charges," like the terminating ILECs would apply "to traffic that originates and terminates within a local area, as defined [in] paragraph [1035 of the *Order*]." In contrast, traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges (*see Local Competition Order*, ¶ 1034), payable by the long distance carriers using the LEC's networks to provide the "end to end" service that they "sell[ ] as [their] product to [their] own customers" (*Southwestern Bell*, 153 F.3d at 542 n.9).[23]

The FCC then "define[d] the local service area for calls to or from a [wireless] network for the purposes of applying" sections 251 and 252, including the reciprocal compensation provisions of section 251(b)(5). *Local Competition Order*, 11 FCC Rcd. at ¶ 1036. The FCC determined that the MTA serves as the most appropriate definition for local service area for wireless traffic for these purposes. *Id.* It stated as follows:

> 1036. On the other hand, in light of this Commission's exclusive authority to define the authorized license areas of wireless carriers, we will define the local service area for calls to or from a [wireless] network for the purposes of applying reciprocal compensation obligations under section 251(b)(5). Different types of wireless carriers have different FCC-authorized licensed territories, the largest of which is the "Major Trading Area" (MTA). Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (i.e., MTA) serves as the most appropriate definition for local service

[23] The Eighth Circuit has affirmed the FCC's determinations to require LECs to charge rates for the use of their networks to transport and terminate "local" calls that differ from the rates they are permitted to charge for the transport and termination of "long distance" calls. *Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1073 (8^{th} Cir. 1997).

> area for [wireless] traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between [wireless] providers. ***Accordingly, traffic to or from a [wireless] network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.***

Id., ¶ 1036 (emphasis added); see also Tr., pp. 91, 2240-41.

The FCC again stressed the regulatory scheme for charges pertaining to local wireless traffic as follows:

> 1043. As noted above, [wireless] providers' license areas are established under federal rules, and in many cases are larger than the local exchange service areas that state commissions have established for incumbent LECs' local service areas. ***We reiterate that traffic between an incumbent LEC and a [wireless] network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251 (b) (5), rather than interstate and intrastate access charges:.*** Under our existing practice, most traffic between LECs and [wireless] providers is not subject to interstate access charges unless it is carried by an IXC, with the exception of certain interstate interexchange service provided by [wireless] carriers, such as some "roaming" traffic that transits incumbent LECs' switching facilities, which is subject to interstate access charges. Based on our authority under section 251 (g) to preserve the current interstate access charge regime, we conclude that the new transport and termination rules should be applied to LECs and [wireless] providers so that [wireless] providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges.

Id., ¶ 1043 (emphasis added).

The FCC has also codified rules prohibiting the imposition of access charges on intraMTA wireless calls. For example, 47 CFR § 51.701(b)(2) defines local wireless traffic as "traffic between a LEC and a [wireless] provider that, at the beginning of the call, originates and terminates within the same Major Trading Area." Consistent with this definition, the FCC held that local wireless traffic is "subject to transport and termination rates under section 251(b)(5) [reciprocal compensation], rather than interstate ***and intrastate*** access charges." *Local Competition Order,* 11 FCC Rcd. at ¶ 1043 (emphasis added). Despite the FCC's clear admonition, the terminating ILECs have for nearly a decade effectively ignored the FCC's rules and prior orders by continuing to bill AT&T Wisconsin their intrastate access charges for such traffic, rather than local traffic subject to reciprocal compensation to be paid by the originating carrier according to terms arrived at through the negotiation or arbitration under the Act.

4. The Exclusive Means For Establishing Reciprocal Compensation Arrangements Is The Negotiation And Arbitration Process

In order to effectuate the goals of the Federal Act, the terminating ILECs' only recourse to compensation for the third-party-originated traffic was to enter into reciprocal compensation arrangements with the originating providers through negotiation if not arbitration. The plain reading of section 251 (b) of the Act clearly shows that *all* local exchange carriers, including *rural* and wireless carriers and CLECs, have a duty to enter into reciprocal compensation arrangements for the exchange of local traffic. 47 U.S.C. § 251(b)(5). Second, the FCC *Local Competition Order* stated that since all wireless carriers offer telecommunications, LECs are obligated, pursuant to section 251(b)(5), to enter into reciprocal compensation arrangements with all wireless carriers for the transport and termination of traffic on each other's networks. *Local Competition Order*, 11 FCC Rcd. at ¶ 1008. The FCC stated:

> Under section 251(b)(5), LECs have a duty to establish reciprocal compensation arrangements for the transport and termination of 'telecommunications.' [Citation to 47 U.S.C., § 251(b)(5).] Under section 3(43), "[t]he term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." [Citation to 47 U.S.C., § 153(43).] All [wireless] providers offer telecommunications. Accordingly, LECs are obligated, pursuant to section 251 (b)(5) (and the corresponding pricing standards of section 252(d)(2)), to enter into reciprocal compensation arrangements with all [wireless] providers, including paging providers, for the transport and termination of traffic on each other's networks, pursuant to the rules governing reciprocal compensation set forth in Section XI.B., below.

Id. (footnote omitted).

Nowhere in the *Local Competition Order* did the FCC even hint that it intended to exempt any terminating ILECs (including rural ILECs) from being required to enter into reciprocal compensation arrangements simply because the traffic is transited through an indirect interconnection. Rather, the FCC has explained that reciprocal compensation obligations apply to all local traffic (*i.e.*, all wireless traffic within an MTA) transmitted between LECs and wireless carriers. Specifically, the FCC stated:

> Section 251 (b)(5) obligates LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic. Although section 252(b)(5) does not explicitly state to whom the LEC's obligation runs, we find that LECs have a duty to establish reciprocal compensation arrangements with respect to local traffic originated by or terminating to any telecommunications carriers. [Wireless] providers are telecommunications carriers and, thus, ***LECs' reciprocal compensation obligations under section 251(b)(5) apply to all local traffic transmitted between LECs and [wireless] providers.***

Id., ¶ 1041 (citation omitted) (emphasis added).

* * *

In sum, the Federal Act the FCC's implementing regulations conclusively subject the termination of local wireless calls that originate and terminate within the same local service area (MTA) to reciprocal compensation set forth in interconnection agreements, not access charges set forth in tariffs. *See Local Competition Order*, 11 FCC Rcd. at ¶ 1036. Section 251(b)(5) of the Act imposes a duty on all local exchange carriers to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). As a matter of federal law, telecommunications carriers cannot impose access charges pursuant to filed tariffs for terminating intraMTA traffic. But that is precisely what the terminating ILECs have done for most of the period since the Federal Act was implemented. That doing so was unlawful and preempted by federal law is something that AT&T Wisconsin made plain to the terminating ILECs nearly ten years ago.

5. <u>The FCC's *T-Mobile* decision reaffirms that access charges do not apply, a conclusion that applies to the period both before and after the *T-Mobile* decision.</u>

On the question of which providers the terminating ILECs may properly bill for transit traffic, the FCC's recent "*T-Mobile*" order is dispositive. *In re Developing a Unified Intercarrier Compensation Regime*; *T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, *FCC* Docket No. 01-92, 2005 FCC LEXIS 1212, ¶ 12 (2005) (the "*T-Mobile Order*"). First, the *T-Mobile Order* fully forecloses any claim by the terminating ILECs claim that they are entitled to compensation under their intrastate access tariffs from AT&T Wisconsin or any other transit provider for terminating wireless traffic. Specifically, the FCC explains that from the time the Federal Act was passed, 47 U.S.C. 251(b)(5) has obligated LECs (including all of the terminating ILECs participating in this proceeding here) to establish reciprocal compensation arrangements for the exchange of traffic between LECs and CMRS providers. *T-Mobile Order*, ¶ 3. Whatever form those arrangements might take, the FCC is clear that wireless traffic is "non-access" traffic that is subject to reciprocal compensation under section 251(b) (5), "rather than interstate or intrastate access charges." *Id.* (citing *Local Competition First Report and Order*, 11 FCC Rcd at 16014, ¶ 1036). Thus, the *T-Mobile Order* eliminates any claim for compensation under the terminating ILECs' intrastate access tariff, including any other tariff under which a terminating ILEC seeks access charge-based compensation from *any party* for the transport and termination of wireless traffic, including the Chequamegon CMRS tariff that is the subject of AT&T Wisconsin's complaint in this proceeding.

Second, like the numerous cases discussed in Section I.B.6 below, the *T-Mobile Order* correctly proceeds from the principle that the party responsible for paying the terminating ILECs the appropriate rate is the provider who originates the traffic, *despite* claims by small LECs in state fora that the transiting providers bear responsibility. See *T-Mobile Order,* ¶¶ 6-7. A third and equally important aspect of the *T-Mobile Order* is its implementation of new FCC rules clarifying that wireless providers are subject to the negotiation and arbitration provisions of the 1996 Act. The new rules "ensure that LECs have the ability to compel negotiations and arbitrations, as CMRS providers may do today" *Id.* at ¶ 16. The terminating ILECs may now "request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures set forth in section 252 of the Act." *Id.* A CMRS provider receiving such a request "must negotiate in good faith and must, if requested, submit to arbitration by the state commission." *Id.* These new rules swept away any contention that the terminating ILECs' are unable to force the wireless providers to the table to negotiate interconnection and compensation arrangements, or that the terminating ILECs therefore need recourse to transit providers like AT&T Wisconsin to determine traffic volumes for billing purposes or to obtain payment for use of the terminating ILECs' networks. The FCC's new rules now empower the terminating ILECs to arbitrate the terms of interconnection, billing arrangements and rates with wireless providers directly.

In short, the *T-Mobile Order* confirms what AT&T Wisconsin has asserted since 1997: (1) that the party responsible for compensating a terminating ILEC for wireless carrier-originated traffic terminated on the terminating ILEC's system is the party that originates the traffic, not the provider who transits it; (2) that the appropriate compensation regime for the termination of any non-access traffic, including wireless-originated traffic, is reciprocal compensation pursuant to 47 U.S.C. § 251(b)(5), not access charges or never-approved "wireless tariffs" which are nothing more than disguised access charges, and; (3) that the process for putting those arrangements in place is the negotiation/arbitration process under the Federal Act. The solution is for the terminating LECs to negotiate compensation arrangements with those providers from whom they expect payment.

The terminating LECs may protest that because they could not *require* a CMRS provider to negotiate an interconnection agreement until the FCC issued the *T-Mobile* decision, it should be allowed to charge AT&T Wisconsin for terminating transit traffic under intrastate access tariffs. The extent to which the terminating ILECs had the leverage to force arbitration under the Federal Act is not legally relevant, however, to the question of ***which*** providers terminating ILECs may properly bill for the termination of transit traffic. That the FCC may not originally have seen fit to expressly articulate a terminating LEC's ability to compel negotiation and arbitration of those arrangements does nothing to mitigate the duty that they and all other carriers have had since 1996 to interconnect directly or indirectly and to enter into reciprocal compensation arrangements for the termination of local traffic. In short, the asserted lack of an ability on the terminating ILECs' part to compel arbitration prior to the *T-Mobile Order* is nothing more than a complaint about the lack of a pre-ordained set of tools to force the conclusion of such arrangements. It is not a basis to claim that in the absence of such tools, transit providers or anyone else is required to pay access charges to the terminating ILECs for the termination of transit traffic sent prior to the FCC's issuance of the *T-Mobile Order*. Indeed, both state and federal courts have held that the *T-Mobile Order* does not allow for imposing charges under access tariffs for transit traffic exchanged prior to the *T-Mobile Order*, despite the asserted absence of an ability on behalf of the terminating ILECs to force arbitration. *See generally State ex rel. Alma Tel. Co. v. PSC*, 183 S.W.3d 575 (Mo. 2006); *Iowa Network Servs.,* *Inc. v. Qwest Corp.*, 385 F. Supp. 2d 850, 902 (S.D. Iowa 2005)(holding that the *T-Mobile Order* represents "merely a clarification of existing standards, and not a change in the law").

Given *T-Mobile* and the court cases discussed in Section I.B.6 below, the circumstances in which it is appropriate for a terminating ILEC to bill for the termination of wireless transit traffic pursuant to tariff are extremely narrow for the period before the *T-Mobile Order* and nonexistent for the period after the *T-Mobile Order* was issued. For the "pre-*T-Mobile*" period, only valid and effective *reciprocal compensation* tariffs could have been used, and only then to charge the *originating provider* for the transport and termination of local traffic.

AT&T Wisconsin is unaware of any such tariffs in Wisconsin. While some terminating LECs submitted "wireless tariffs" which purport to apply to transited CMRS traffic and which hold the transit or originating provider liable at the terminating ILECs' option, those tariffs do not qualify. First, AT&T Wisconsin is unaware that these tariffs ever became effective in terms of obtaining any necessary approval or filing by the Commission. Even if they were properly filed or approved, these "wireless tariffs" were nothing but access tariffs in disguise, in that they simply appear to have adopted the access charges and applied them to CMRS transit traffic. A perfect example of these thinly disguised access charges is Chequamegon Communication Cooperative's "wireless tariff," attached hereto under Tab E, which imposes a "transport and termination" charge of a whopping $.08 per minute of use, an amount roughly equivalent to the per-minute rate that Chequamegon charges under its access tariff, and one that could never be supported as a reciprocal compensation charge under the cost-based pricing requirements of the Federal Act. Third, no terminating LEC except Chequamegon has ever billed AT&T Wisconsin under their "wireless tariffs," and even Chequamegon stopped billing under that tariff after the FCC issued the *T-Mobile Order*. For the period following *T-Mobile*, terminating ILECs' use of tariffs to charge reciprocal compensation would be categorically improper. Instead, during the period while arrangements are being negotiated or arbitrated, the terminating ILEC may implement the interim pricing provisions for reciprocal compensation set forth in 47 C.F.R. § 51.715. *See T-Mobile Order*, ¶ 16 & n. 65; 47 C.F.R. § 51.715(a).

6. Courts Applying The Federal Act's Mandatory Standards Have Uniformly Held That Transit Providers Are Not Liable For Access Charges For Wireless-Originated Traffic.

Several recent cases have been presented to state and federal courts – most arising out of state commission proceedings – in which terminating LECs have sought recovery of access charges from the transit provider or otherwise for local wireless traffic. In each and every instance, the courts have rejected application of access charges on the transit provider. *See, e.g., WWC License, L.L.C. v. Boyle et. al.*, No. 4:03CV3393, 2005 U.S. Dist. LEXIS 17201, at *9 (D. Neb. Jan. 20, 2005)(unpublished) (holding that under the FCC's decisions, originating carriers must pay compensation to terminating carriers under the reciprocal compensation provisions of the 1996 Act "whether or not the call was delivered via an intermediate carrier"); *Union Tel. Co. v. Qwest Corp.*, No. 02-CV-209D, 2004 U.S. Dist. LEXIS 28417, at *36, 49 (D. Wyo. May 11, 2004) (unpublished) (finding that "the termination of wireless calls that originate and terminate within the same local service area . . . are subject to reciprocal compensation . . . not access charges set forth in tariffs . . . regardless of whether the traffic originates on or transits [the networks of other carriers] and irrespective of whether that traffic terminates in Wyoming, Utah, or Colorado"); *3 Rivers Tel. Coop., Inc. v. U.S. West Commc'ns, Inc.*, No. CV 99-80-GF-CSO, 2003 U.S. Dist. LEXIS 24871, at **65, 68 (D. Mont. Aug. 22, 2003) (unpublished) (holding that traffic between a local exchange carrier and a wireless provider that originates and terminates within the same major trading area is local traffic and "is not subject to terminating access charges, but rather to reciprocal compensation . . . regardless of whether it flows over the facilities of other carriers along the way to termination"); *In re Complaint of Union Tel. Co.*, No. 05-054-01 (Utah P.S.C. September 28, 2005) (holding that Union Telephone was not entitled to tariffed access charges in lieu of reciprocal compensation where Union Telephone did not have an interconnection agreement in place during the relevant time period); *In re Mark Twain Rural Tel. Co.'s Proposed Tariff to Introduce Its Wireless Termination Serv.*, No. TT-2001-139, 2001 Mo. PSC LEXIS 760, *22, 10 Mo. P.S.C.3d 29 (Feb. 8, 2001) (noting that "intraMTA traffic to and from a wireless carrier is local traffic and that local traffic is not properly subject to switched access charges").

a. Iowa Network Services, Inc. v. Qwest Corporation and RIITA v. Iowa Utilities Board

In August 2005, the United States District Court for the Southern District of Iowa issued two decisions directly addressing the question of whether a terminating ILEC may bill a transit provider for the termination of transit traffic. *Iowa Network Servs., Inc. v. Qwest Corp.*, 385 F. Supp. 2d 850 (S.D. Iowa 2005) ("*Qwest*"); *Rural Iowa Independent Tel. Ass'n v. Iowa Utils. Bd.*, 385 F. Supp. 2d 797 (S.D. Iowa 2005)) (*"RIITA"*). These cases are companion cases arising out of Iowa Utilities Board proceedings, in which the IUB concluded that transit provider *Qwest* was not liable under any theory for paying termination related charges to the terminating ILECs for wireless transit traffic.[24]

In *Qwest*, the plaintiff INS – an entity owned by terminating rural ILECs, including those in Rural Iowa Independent Telephone Association – sought payment of access charges from Qwest for transit traffic that was originated by wireless carriers and transited by Qwest to the plaintiff over what the plaintiff asserted were trunks whose purpose was only to transport Qwest-

[24] Both are entirely consistent in their holdings and address similar issues, although the court in *Qwest* more broadly interprets federal law on the transit issue. For this reason and for efficiency, AT&T Wisconsin focuses on the court's decision in *Qwest*.

originated toll traffic. Importantly, the litigants in *Qwest* did not agree that the third-party traffic at issue was limited to intraMTA wireless traffic. Instead, INS maintained that the "relative proportion" of wireless calls compared with other third-party calls was unknown and that Qwest had simply failed to prove that the third-party traffic was exclusively wireless intra-MTA traffic. *See* 385 F. Supp. 2d at 870.

Like AT&T Wisconsin, Qwest's network collected both wireline and wireless traffic and directed this traffic to INS. *See id.* at 857. Qwest commingled all of this traffic before transmitting it to INS. *See id.* As a result, it was undisputed that the identity of the wireless or other originating carrier was not readily ascertainable by INS' equipment. *See id.* at 857-58. Seizing on these facts, INS relied on its intrastate tariff[25] as the basis for its authority to recover access charges from Qwest for third-party wireless traffic. *See id.* at 855. Alternatively, INS sought recovery of access charges under a theory of unjust enrichment. *See id.*

In granting Qwest's motion for summary judgment, the court rejected both of INS' claims. As to INS' tariff claims, the *Qwest* court determined that the third-party traffic at issue in the litigation was local, as supported by both "the 1996 Act and the FCC decisions implementing and explaining the Act." *Id.* at 870. Moreover, the court determined that the local nature of the traffic "holds regardless of whether transiting carriers are involved in the transportation of the call from the originating customer to the end user being called." *Id.*

Having determined that third-party traffic was local, the court went on to hold that Qwest was not liable for access charges because access charges are not available for local traffic. *See id.* at 878. Instead, the Court held that local traffic is subject only to reciprocal compensation, which is determined exclusively by negotiations between the originating and terminating carriers. *See id.* at 890. Accordingly, INS had no claim against Qwest for access charges

[25] INS also claimed charges under its interstate access tariff filed at the FCC.

stemming from third-party traffic. It is noteworthy that the court was not swayed by INS' claim that there was no proof that all traffic was wireless intra-MTA. Instead, the court stated in relevant part as follows:

> [T]he exact nature of each of the calls at issue is not dispositive of Qwest's motion for summary judgment. While a factual dispute is apparent, this does not generate a *material* issue of fact if the law requires INS to proceed through the process of negotiation and arbitration, rather than pursuant to tariffs or equitable remedies, before a legally supportable claim may be advanced in this Court.

See id. at 871.

The *Qwest* court dispensed with INS' equitable claim for unjust enrichment by finding that INS had an obligation to negotiate and arbitrate interconnection agreements for reciprocal compensation with the originating carrier, and thus could not recover under a theory of unjust enrichment. The court held "[i]t is well-settled that a claim for unjust enrichment must be dismissed if applicable federal or state regulation provides a compensation mechanism to the plaintiff." *See id.* at 905. If it were otherwise, the court noted, then INS would be in a position to bypass the very regulatory scheme, described at length above, that has been mandated by the Act and the FCC. *See id* at 909.

b. <u>3 Rivers Telephone Coop., Inc. v. US WEST Communications, Inc.</u>

Similarly in *3 Rivers Telephone Coop., Inc. v. US WEST Communications, Inc.*, No. CV 99-80-GF-CSO, 2003 U.S. Dist. LEXIS 24871 (D. Mont. Aug. 22, 2003), the court found that U.S. West (now known as Qwest), a LEC and long distance telecommunications provider, was not liable for terminating access charges on wireless traffic that originated and terminated within the same MTA. *3 Rivers*, 2003 U.S. Dist. LEXIS 24871. Qwest argued that if it was not the carrier originating the traffic, it should not be liable for terminating carrier access charges. *Id.*

The plaintiffs sued Qwest, alleging that Qwest breached access tariffs by failing to pay terminating long distance access charges that it transported to plaintiffs for delivery to plaintiffs' subscribers. The plaintiffs also claimed unjust enrichment. Plaintiffs made claim that Qwest was liable for the access charges under the applicable tariffs regardless of whether the traffic originated as a wireline or wireless call. *Id.* at *13-14. Qwest, however, maintained that as a mere transit provider, it could not be liable for terminating access charges that its own subscribers did not originate. *Id.* at *14.

The court found that Qwest was not liable for paying plaintiffs' terminating carrier access charges under the tariffs on wireless traffic that originated and terminated in the same MTA. *Id.* at *68-69. In interpreting the applicable provisions of the Act and the *Local Competition Order*, the court found that traffic between a LEC and a wireless provider that originates and terminates in the same MTA is local traffic and is subject to reciprocal compensation, not terminating access charges. *Id.* at *65. The court ruled that federal law preempted the tariffs to the "extent that the reciprocal compensation scheme applies to [local wireless] traffic that originates and terminates in the same MTA, regardless of whether it flows over the facilities of other carriers along the way to termination." *Id.* at *68. As such, plaintiffs were not entitled to recovery for this type of traffic under its long distance access charge tariffs. *Id.* at *68-69.

c. Union Telephone Company v. Qwest Corporation

The District Court of Wyoming's decision in *Union Telephone Co. v. Qwest Corp.*, No. 02-CV-209-D, 2004 U.S. Dist. LEXIS 28417 (D. Wyo. May 11, 2004) also addressed issues similar to those in this proceeding. The dispute in that case was whether Qwest was required to pay Union Telephone terminating intrastate access charges set forth in intrastate tariffs that Union had filed with the state public utility commissions in Wyoming, Utah and Colorado. *Id.* at *15. Union Telephone complained that Qwest was providing and profiting from long distance services which allowed Qwest's long distance customers to originate calls terminated in Union's local service territory. *Id.* Pursuant to various legal theories, including breach of tariff requirements and unjust enrichment, Union Telephone claimed that it was entitled to compensation from Qwest for its intrastate tariffed terminating access services. *Id.* at *15-16. Qwest sought summary judgment on all of Union Telephone's claims.

Two aspects of the court's decision in *Union Telephone* apply directly to this docket. First, the court held that the filed rate doctrine prevented Union Telephone from recovering for the wireless traffic through reliance on its traditional wireline access charge tariffs. *Id.* at *34-35. Notably, Union Telephone conceded that its complaint relied tariffs applicable only to landline traffic. It had no interconnection agreement with Qwest, and there was no other agreement under which Qwest was required to pay access charges for Union's termination of wireless traffic. *Id.* On these facts, the Wyoming Supreme Court had previously found that Union Telephone could not, "in an attempt to collect access charges for terminating wireless traffic . . ., *simply adopt the landline terminating access charges without a filing under the cellular service*." *Id.* at *34. Since the "*majority* of the calls for which Qwest ha[d] not paid access charges invoiced to it under Union's state access tariffs [were] wireless calls," and Union Telephone failed to file tariffs for wireless services, the court found that there was no basis for recovery. *Id.* at *34-35 (emphasis added).

The court also relied on the Federal Act as an additional basis to deny Union Telephone's claim. *Id.* at *36. The court ruled that, as a matter of law, telecommunications carriers could not impose access charges pursuant to filed tariffs for terminating intraMTA traffic. *Id.* The court reasoned that under the Federal Act and the FCC's regulations, "the termination of wireless calls that originate and terminate within the same [MTA] are subject to reciprocal compensation set forth in interconnection agreements, not access charges set forth in tariffs." *Id.* The court also stated that the Federal Act requires LECs, such as Union Telephone, to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." *Id.* Such compensation arrangements must be established through procedures and negotiations as set forth in the Federal Act. However, since Union failed to follow those procedures, the court found that it was not entitled to recover from Qwest for the intraMTA wireless traffic transiting Qwest's network. *Id.* at *37.

d. <u>State ex rel. Alma Tel. Co. v. Missouri PSC</u>.

A recent Missouri Supreme Court case is also instructive, particularly in its application of the *T-Mobile* order. In *State ex rel. Alma Tel. Co. v. PSC.*, 183 S.W.3d 575 (Mo. 2006), the court applied *T-Mobile* to preclude the application of pre-existing "wireless tariffs" to transit wireless traffic. In *Alma Tel. Co.*, the PSC had previously ordered the CMRS providers to seek reciprocal compensation arrangements with the terminating LECs for the termination of the wireless traffic or, otherwise, to cease delivering wireless traffic to the terminating LECs. *Alma Tel. Co.,* 183 S.W.3d at 576. Despite its order, few reciprocal arrangements were entered, and the CMRS providers continued to transmit wireless originated traffic to the terminating LECs, which were unable to block the wireless calls. *Id.* In an effort to obtain compensation, the terminating LECs billed the CMRS providers under existing access tariffs, which established the rates that the LECs could charge for completing long distance or toll calls on their local exchanges. *Id.* at 576-77. However, the CMRS providers refused to pay on the grounds that the tariffs did not apply to wireless originated traffic, which the FCC deemed to be intraMTA, or local traffic. *Id.* at 577.

In 1999, the LECs filed proposed amended access tariffs with the PSC to clarify the tariffs' applicability to wireless originated traffic. Under the proposal, each tariff was to be amended as follows:

> The provisions of this tariff apply to all traffic regardless of type or origin, transmitted to or from the facilities of the Telephone Company, by another carrier, directly or indirectly, until and unless superseded by an agreement approved pursuant to 47 U.S.C. 252, as may be amended.

Id. The Missouri PSC rejected the proposed amended tariffs. On appeal, the Missouri supreme court relied heavily on the FCC's *Local Competition Order* and its *T-Mobile Order* to affirm the Missouri PSC's rejection of the terminating ILECs wireless termination tariffs, because they were, in effect, access tariffs. *Id.* at 577-78.

Noting that the *T-Mobile Order* does allow for compensation in the absence of reciprocal compensation arrangements under "the terms of otherwise applicable state tariffs" for traffic exchanged prior to the decision, the court concluded that access tariffs are not "otherwise applicable state tariffs." *Id.* at 577. In so concluding, the court relied on the *Local Competition Order*, which "makes a critical distinction between transport and termination tariffs, which are applicable to local traffic, and access tariffs, which are applicable to long-distance traffic." *Id.* at 578 (citing *Local Competition Order,* ¶¶ 1033, 1035-36). On the basis of this distinction, and because the traffic at issue was intraMTA wireless traffic, the court concluded that "only tariffs pertaining to transport and termination [i.e., reciprocal compensation] rates may be imposed, and conversely, tariffs pertaining to interstate and intrastate access charges may not be imposed." *Id.* Thus, the court concluded, the Missouri PSC was correct in disallowing the tariffs at issue as impermissible access tariffs. *Id.*

The court rejected the terminating ILECs reliance on an earlier Missouri case, *State ex rel. Sprint Spectrum, L.P. v. Missouri PSC,* 112 S.W.3d 20 (Mo. Ct. App. 2003). In *Sprint*, the tariffs in question were not access tariffs but were instead filed and effective tariffs specifically addressing reciprocal compensation charges for intraMTA traffic – tariffs explicitly approved under the *Local Competition Order*. *Alma Tel.*, 183 S.W.3d at 578. They were not the kind of repackaged access charge tariffs that some of the terminating ILECs have filed in Wisconsin. The court also rejected the terminating ILEC's reliance on the Federal Act's "safe harbor" provision in 47 U.S.C. § 251(g). That provision, the Missouri court explained, provides that until reciprocal compensation agreements are entered into, LECs may rely on the same state tariffs that applied to wireless traffic before the Federal Act was enacted. *Id.* However, just as in Wisconsin, the intrastate access tariffs available to the terminating LECs at the time of the Federal Act's passage did not purport to cover intraMTA wireless traffic. *Id.* Noting that it was precisely the absence of that coverage which prompted the terminating LECs to seek to enlarge the scope of those access tariffs in the first place, the court concluded that the pre-existing tariffs applied only to long-distance traffic, rather than wireless traffic placed within the MTA. *Id.* The terminating LECs' access tariffs in Wisconsin are similarly inapplicable. Also inapplicable are "wireless tariffs" which do not truly impose reciprocal compensation charges that conform with the Federal Act but which are merely poorly disguised access tariffs.

*   *   *

Each of the authorities discussed above instructs that AT&T Wisconsin, as the transit provider, is not liable under the terminating ILECs' intrastate access tariffs for the disputed traffic, either for pre *T-Mobile* or post *T-Mobile* transit traffic. In addition, they instruct that the only compensation that the terminating ILECs may be entitled to for transit traffic is that which they may arrange on a going-forward basis in reciprocal compensation agreements with the originating providers.